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Listed below are the item(s) being submitted with this Certificate of Transmission:

- 1) Appeal Brief Transmittal + 1 copy
- 2) Appeal Brief and Appendix of Claims— 9 pages

Number of Pages Including this Page: 12

Inventor(s): Scavone et al.

S.N.: 10/057,182

Filed: 01/25/2002

Conf. No.: 5287

Case: 8854

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/057,182
Applicant(s) : Timothy A. Scavone et al.
Filed : 01/25/2002
Title : Antiperspirant Compositions Containing Petrolatum
TC/A.U. : 1617
Examiner : Shengjun Wang
Conf. No. : 5287
Docket No. : 8854
Customer No. : 27752

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BRIEF ON APPEALS

Mail Stop Appeal Brief – Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:


Enclosed, pursuant to 37 C.F.R. 1.192(a), is Appellant's brief on Appeal for the above application.

The fee for this Brief on Appeal is \$500.00 pursuant to 37 CFR 1.17(c).

The Director is hereby authorized to charge the above fee, or any additional fees that may be required, or credit any overpayment to Deposit Account No. 16-2480 in the name of The Procter & Gamble Company. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



Vladimir Vitenberg
Registration No. 42,204
(513) 626-1932

March 22, 2005

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Dear Sir:

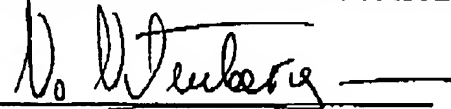
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APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
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Dear Sir,

This Brief is filed pursuant to the appeal from the U.S. Patent and Trademark Office decision of Final Rejection dated 09/21/2004 and Advisory Action dated 12/14/2004.

A timely Notice of Appeal was filed on January 27, 2005.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1 -- 23 were finally rejected.

Claims 1 -- 18 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

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Appeal Brief dated 03/21/2005
Customer No. 27752

STATUS OF AMENDMENTS

Amendment after Appeal, canceling claims 19-23, was filed on March 21, 2005, pursuant to 37 CFR §41.33.

SUMMARY OF CLAIMED SUBJECT MATTER

The claimed invention is directed to an antiperspirant compositions comprising:

- (a) from about 0.1% to about 30% by weight of an antiperspirant active (claims 1-18, page 5 line 1 – page 6 line 29);
- (b) from about 0.05% to about 0.95% by weight of petrolatum (claims 1-18, page 1 line 27 – page 2 line 6, page 3 line 22 – page 4 line 30);
- (c) from about 10% to about 99% by weight of a liquid carrier (claims 1-18, page 8 line 6 – page 9 line 21);
- and
- (d) from about 0.1% to about 30% by weight of a suspending agent (claims 1-18, page 7 line 1 – page 8 line 2).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Rejection under 35 U.S.C. §103(b) over U.S. Patent No. 5,176,903 in further view of U.S. Patent No. 5,626,856 and U.S. Patent No. 5,902,571

Claims 1-18

Claims 1-18 stand finally rejected under 35 U.S.C. §103(a) as being unpatentable over Goldberg et al., (US 5,176,903) (“Goldberg” thereafter) in further view of Berndt (US 5,626,856) (Berndt” thereafter) and Putman et al., (US 5,902,571) (“Putman” thereafter).

ARGUMENTS

Examiner primarily relies on Goldberg to make the §103(a) rejection. Examiner is correct to state that Goldberg teaches an antiperspirant-containing composition comprising *[inter alia]* 12-30% of “wax.” *Final Rejection*, page 3, paragraph 3; see also *Goldberg*, column 4 lines 36-39. Examiner recognizes that “Goldberg et al. does not teach expressly the particularly *[sic]* amount of petrolatum herein, or the particular amounts of other ingredients.” *Id.*, page 3, paragraph 4. Nevertheless, Examiner asserts that the claimed range of petrolatum, from about 0.05 to about 0.95%, overlaps with that

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disclosed by Goldberg. *Id.*, paragraph 5. This is so because “Goldberg et al. discloses generally usefulness of mixture of the wax material, which would encompass all range of mixing, including the range herein claimed (0.05%-0.95% of petrolatum to 0.1 to 30% of suspending agents [*sic*].” *Id.*

Applicants respectfully disagree.

Goldberg is concerned with an antiperspirant/deodorant composition containing a cosmetically effective amount of microcapsules which encapsulate a composition comprising fragrance and an ester. *Goldberg*, Abstract. Goldberg includes petrolatum in a long “laundry” list of eighteen subordinate waxes that may (or may not) be used in the composition. *Goldberg*, column 4, lines 63-68. Given the list of seventeen other subordinate waxes recited along with petrolatum by Goldberg, one skilled in the art may reasonably decide not to include petrolatum in the composition at all, especially in light of the fact that none of the examples of Goldberg contains petrolatum. *Goldberg*, column 6 line 36 – column 7 line 50. After all, based on Goldberg, the mathematical probability that one skilled in the art would choose petrolatum – in any amount – is less than 6% (one out of eighteen). And this is not taking into account that Goldberg does not teach any range of petrolatum, let alone the specific claimed range.

Nor does Goldberg disclose any desirability of using petrolatum over other seventeen subordinate waxes listed in the group. Goldberg simply does not appreciate any significance of the presence or absence of petrolatum, much less a specific low content thereof. Goldberg does not recognize that selectively low concentrations of petrolatum in antiperspirant compositions allow for both antiperspirant efficacy and wash-off benefits. See, *Specification.*, page 1 line 27 – page 2 line 2, page 3 line 24 – page 4 line 2. Any consideration of Goldberg’s disclosure as a whole, mandated by *MPEP 2141*, neither provides any motivation to use nor indicates any desirability of using petrolatum in the claimed range.

On the contrary, Goldberg as a whole appears to teach away from using petrolatum in the claimed low amount. First, none of the Goldberg’s examples contains petrolatum. *Goldberg*, column 6 line 36 – column 7 line 50. Examples 1 and 2 of Goldberg recite hydrogenated castor oil (as a subordinate wax), not petrolatum. *Goldberg*, column 6 lines 40-50 and column 7 lines 21-33. Second, hydrogenated castor

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oil is recited in the amount of 5.000%, which is significantly higher than the range of petrolatum claimed in the present invention. Based on these teachings, one skilled in the art would not be motivated to use petrolatum in the specific low amount presently claimed.

The other two cited references, Berndt and Putman, are cumulative at best, and neither, alone or in combination with the other and/or Goldberg, teaches or suggests the present invention.

Berndt discloses the use of petrolatum (categorized as "oil"), *Berndt*, column 4 lines 56-61 and column 5 lines 3-12. Berndt, however, does not recognize that petrolatum is beneficial for both efficacy and wash-off effects in antiperspirant compositions when used in low concentrations therein. Instead, Berndt discloses the following ranges of white petrolatum in the examples pertaining to antiperspirant/deodorant formulations: 15% (Example 1, Formula A); 12% (Example 1, Formula B); 15% (Example 1, Formula C); 15% (Example 1, Formula D); 15%, with the formula range of 5-20% (Example 2); and 5%, with the formula range of 2.5-10% (Example 3). *Berndt*, column 14 line 56 – column 15 line 40. None of these ranges is anywhere close to the claimed range (from about 0.05 to about 0.95%) of the present invention.

Putman includes petrolatum in a list of non-limiting examples of suitable residue-masking materials for use in the antiperspirant products (which list recites ten suitable materials). *Putman*, column 6 lines 32-37. Similarly to Goldberg and Berndt, Putman fails to recognize any significance of a low-content inclusion of petrolatum into a composition, as required by the present invention. There is no teaching or suggestion in Putman that would lead one skilled in the art to choose petrolatum over other "non-limiting" suitable materials listed therein, let alone in the specific low range claimed in the present invention. None of Putman examples include petrolatum. *Id.*, column 7 line 43 – column 8 line 49. Instead, Examples I, II, and III of Putman recite butyl stearate (identified as a residue-masking materials, *Id.*, column 6 lines 32-37) in the amounts of 5%, 5%, and 33.5%, respectively. These amounts are considerably higher than the range of petrolatum claimed in the present invention.

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Examiner cites *In re Woodruff* for the proposition that where the claimed ranges overlap with or lie inside ranges disclosed by the prior art, a *prima facie* case of obviousness exists. *Final Rejection*, page 5, citing *In re Woodruff*, 919 F.2d 1575, 15 USPQ2d 1934 (Fed. Cir. 1990).

In *In re Woodruff* the court correctly considered the claimed range of more than 5% of carbon monoxide to overlap with the prior-art teaching of about 1-5% of carbon monoxide. Thus, in *In re Woodruff* the prior art relied upon expressly taught a particular range (1-5%) of a specific claimed component (carbon monoxide), and that range was found to overlap with the claimed range.

Examiner's reliance on *In re Woodruff* fails to recognize that in the present case, Goldberg does not teach any range of the specific claimed component, petrolatum, let alone a range that overlaps with or encompasses the claimed range. Moreover, the Examiner's reliance on *In re Woodruff* contradicts the Examiner's own statement that "Goldberg et al. does not teach expressly the particular[] amount of petrolatum" *Final Rejection*, page 3, paragraph 4. The fact pattern in the present case is principally different from that in *In re Woodruff*, and the reliance on *In re Woodruff* is misplaced.

Equally misplaced is the Examiner's reasoning with respect to the optimization of a result-effective parameter. *Final Rejection*, page 4.

A particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation. *MPEP*, Section 2144.05, citing *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977). As has been shown above, none of the cited references recognizes that selectively low concentrations of petrolatum in antiperspirant compositions provide improvement in both antiperspirant efficacy and wash-off performance. None of the cited references recognizes low concentrations of petrolatum to be a result-effective variable.

In sum, the cited references, alone or in combination, do not teach or suggest all of the limitations recited in Claim 1 of the present invention, particularly the specific range of petrolatum. None of the cited references, alone or in combination, recognize the importance of a low-content inclusion of petrolatum into antiperspirant compositions and

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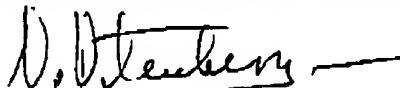
therefore provides any motivation to use petrolatum in the range claimed. The Examiner's 35 USC §103 rejection is based on an impermissible hindsight afforded by the present invention. *MPEP 2141*.

SUMMARY

In view of the foregoing arguments, it is respectfully submitted that the presently pending claims 1-23 are patentable over the cited references. The Board is respectfully requested to reverse the PTO Final Rejection and allow all claims pending on this appeal.

Respectfully submitted,

THE PROCTER & GAMBLE COMPANY



Vladimir Vitenberg
Registration No. 42,204
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March 22, 2005

Customer No. 27752

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CLAIMS APPENDIX

1. (Original) Antiperspirant compositions comprising:
 - (a) from about 0.1% to about 30% by weight of an antiperspirant active;
 - (b) from about 0.05% to about 0.95% by weight of petrolatum;
 - (c) from about 10% to about 99% by weight of a liquid carrier; and
 - (d) from about 0.1% to about 30% by weight of a suspending agent.
2. (Original) An antiperspirant composition according to Claim 1, wherein petrolatum concentration ranges from about 0.3% to about 0.8% by weight of the composition.
3. (Original) An antiperspirant composition according to Claim 1, wherein the petrolatum comprises White Petrolatum U.S.P.
4. (Original) An antiperspirant composition according to Claim 3, wherein the petrolatum has a Saybolt Viscosity of at least about 55.
5. (Original) An antiperspirant composition according to Claim 1 wherein the composition is anhydrous and contains less than 5% by weight of free or added water.
6. (Original) An antiperspirant composition according to Claim 1 wherein the antiperspirant active is selected from the group consisting of zirconium-containing active, aluminum-containing active, and combinations thereof.
7. (Original) An antiperspirant composition according to Claim 4 wherein the antiperspirant active is selected from the group consisting of aluminum chlorohydrate, aluminum dichlorohydrate, aluminum sesquichlorohydrate, aluminum chlorohydrate propylene glycol complex, aluminum dichlorohydrate propylene glycol complex, aluminum sesquichlorohydrate propylene glycol complex, aluminum chlorohydrate polyethylene glycol complex, aluminum dichlorohydrate polyethylene glycol complex, aluminum sesquichlorohydrate polyethylene glycol complex, aluminum sesquichlorohydrate

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polyethylene glycol complex, aluminum zirconium trichlorohydrate, aluminum zirconium tetrachlorohydrate, aluminum zirconium pentachlorohydrate, aluminum zirconium octachlorohydrate, aluminum zirconium trichlorohydrate glycine complex, aluminum zirconium tetrachlorohydrate glycine complex, aluminum zirconium pentachlorohydrate glycine complex, aluminum zirconium octachlorohydrate glycine complex, aluminum chloride, aluminum sulfate buffered, and combinations thereof.

8. (Original) An antiperspirant composition according to Claim 5, wherein the antiperspirant active comprises a zirconium-containing active and an aluminum-containing active, at a combined concentration of from about 5% to about 30% by weight of the composition.
9. (Original) An antiperspirant composition according to Claim 6 wherein the carrier comprises a volatile cyclomethicone that represents from about 5% to about 80% by weight of the composition.
10. (Original) An antiperspirant composition according to Claim 7, wherein the carrier further comprises a non-volatile silicone liquid that represents from about 1% to about 35% by weight of the composition.
11. (Original) An antiperspirant composition according to Claim 1, wherein the antiperspirant active is in the form of solid particulates.
12. (Original) An antiperspirant composition according to Claim 1, wherein the composition further comprises from about 3% to about 35% by weight of a suspending agent.
13. (Original) An antiperspirant composition according to Claim 10, wherein the composition is in the form of a solid stick.

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14. (Original) An antiperspirant composition according to Claim 10, wherein the composition is in the form of a soft solid.
15. (Original) An antiperspirant composition according to Claim 10, wherein the suspending agent comprises hydrogenated castor oil.
16. (Original) An antiperspirant composition according to Claim 1, wherein the composition further comprises from about 0.1% to about 10% by weight of PEG-8 distearate.
17. (Original) An antiperspirant composition according to Claim 1, wherein the composition further comprises from about 0.1% to about 5% by weight of silica.
18. (Original) An antiperspirant composition according to Claim 1, wherein the composition further comprises from about 0.1% to about 10% by weight of C18-36 triglycerides.